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IN THE
Supreme Court of the United States

OCTOBER TERM, 1939

NO. **105-1** 110

LEE H. MARSHALL HEIRS, ET AL., FIDELITY
TRUST COMPANY, Trustee, Petitioners,

v.

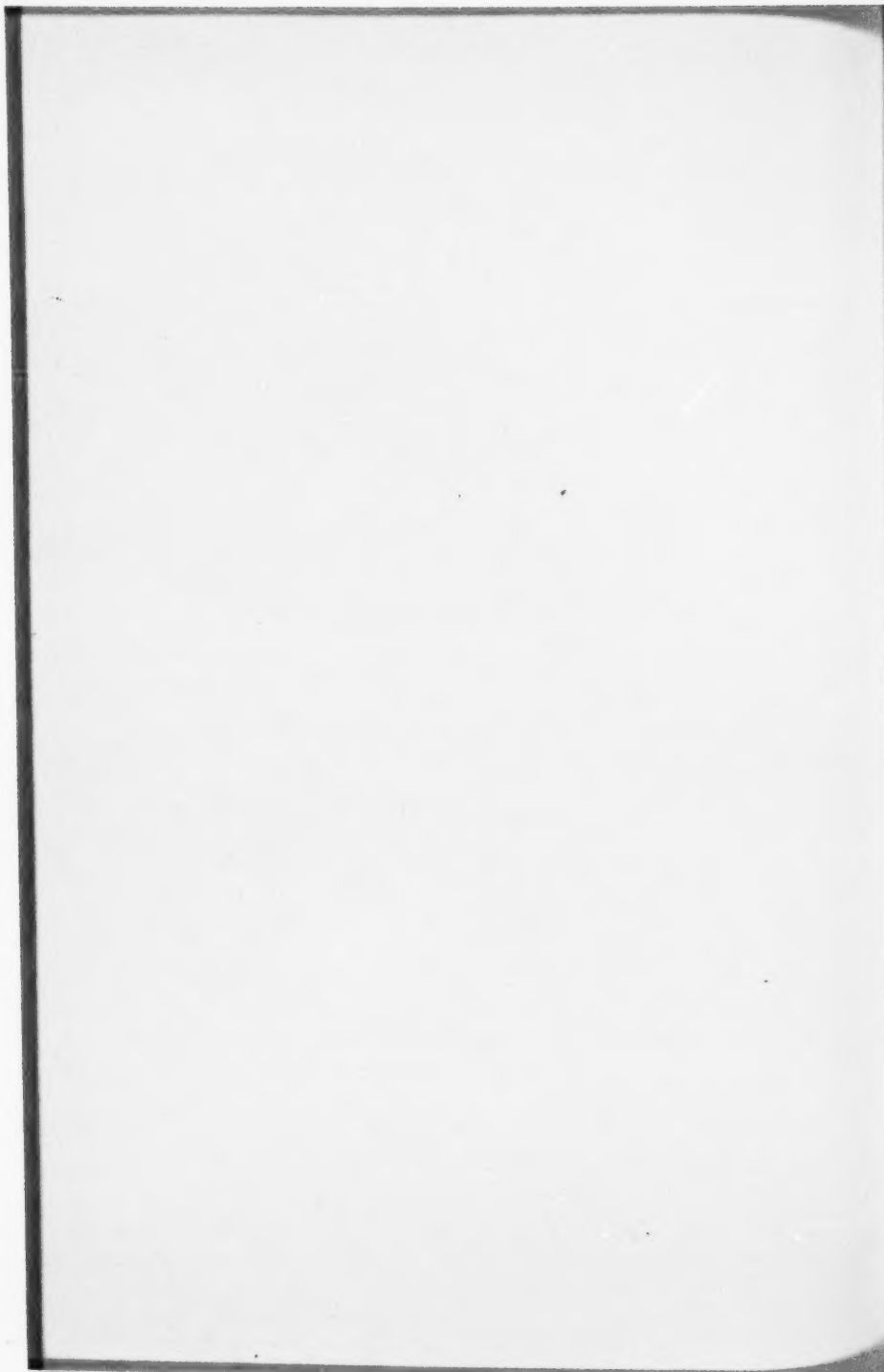
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

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INDEX TO BRIEF.

	PAGE
Summary Statement of the Matter Involved.....	1
Reasons Relied on for the Allowance of the Writ...	5
Brief in Support of Petition for Certiorari.....	8
I. Opinions Below	8
II. Jurisdiction	8
III. Statement of the Case.....	8
IV. Specification of Errors Intended to be Urged	10
V. Argument	
1. The Decision of the Court Below Con-	
flicts With Decisions of This Court....	10
a. The Trust Was Limited to a Par-	
ticular Property	15
b. The Trust Was of Limited Duration	15
c. The Trust Had a Definite Body of	
Beneficiaries	16
d. The Trust Was Not Operated as a	
Separate Entity	16
e. The Trust Had No Books of Its	
Own	17
f. The Trust Involved No "Manage-	
ment" in any Proper Sense.....	17
g. The Trust Was Not Used as a De-	
vice for Financing an Enterprise..	19
h. The Additional Powers of the Trus-	
tee Do Not Alter the Nature of the	
Trust	19

List of Cases Cited.

	PAGE
2. The Decision of the Court Below Conflicts With Decisions of the Circuit Courts of Appeals for the First and Seventh Circuits	20

List of Cases Cited.

A. A. Lewis & Co. v. Commissioner, 301 U. S. 385, 81 L. Ed. 1174 (1936)	6, 14
Germantown Trust Company v. Commissioner, 309 U. S., 84 L. Ed.	5
Helvering v. Coleman-Gilbert Associates, 296 U. S. 369, 80 L. Ed. 278 (1935)	10
Helvering v. Combs, 296 U. S. 365, 80 L. Ed. 275 (1935)	10
Lansdowne Realty Trust v. Commissioner, 50 F. (2d) 56 (C. C. A. 1, 1931)	6, 21
Morrissey v. Commissioner, 296 U. S. 344, 80 L. Ed. 263 (1935)	6, 10, 11
Myers v. Commissioner, 89 F. (2d) 86, (C. C. A. 7, 1937)	6, 20
Swanson v. Commissioner of Internal Revenue, 296 U. S. 362, 80 L. Ed. 273 (1935)	10
Tyson v. Commissioner, 54 F. (2d) 29 (C. C. A. 7, 1931)	21

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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

*To the Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Fidelity Trust Company respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Third Circuit, filed in the above case, affirming, by a divided opinion, a decision of the Board of Tax Appeals in which said Board, also by divided opinion, sustained a determination made by the Commissioner of Internal Revenue that additional income taxes and excess profits taxes are due from the petitioner for the year 1934, on the ground that the trust of which the petitioner was trustee was an "association" taxable as a corporation.

Summary Statement of the Matter Involved.

The only question at issue is whether the trust, of which the petitioner was trustee, was an "association" within the terms of Section 801 (a) (2) of the Revenue

Act of 1934 (c. 277, 48 Stat. 680), which provides that the term "corporation" as used in said Act includes "associations."

The trust estate here in question consisted of a single piece of land, forming part of a larger tract upon all of which the lessee of the tract had erected a business building. The lease had been entered into several years before the trust was created, and the trust was co-terminous with the lease.

The trust was created by deed of trust (R. 81) dated November 30, 1925, executed by Lee H. Marshall, Vardy Marshall Morris, Margaret Marshall Hamilton, and Elizabeth Marshall Rowe (hereinafter referred to as the "Marshall heirs"), their respective spouses joining. Fidelity Trust Company (then called Fidelity Title and Trust Company), a trust company doing business in the City of Pittsburgh, Pennsylvania, was named as trustee. The grantors and "their heirs, executors, administrators and assigns" were named beneficiaries.

By virtue of the deed the Marshall heirs conveyed to the trustee a certain tract of land in the City of Pittsburgh, of which they were then the owners, subject to a certain mortgage and to leases, originally entered into in 1917 and, in 1924, extended to April 30, 1968, under which the land was leased to a corporation (in which the Marshall heirs had no interest).

As appears from a plot plan (R. 91), the Marshall land constitutes only a portion of a larger tract, bounded by Diamond Street, Smithfield Street and Fifth Avenue, which is owned by various owners. By virtually identical long term leases (R. 93) the owners of the several portions of the tract leased the land to a tenant who erected on the whole tract a single building, known as the Frank & Seder Department Store. None of the owners of the various parcels of the large tract has any

interest in the building, except only whatever interest he may, as a result of his ownership of the land, have in that portion of the building which stands upon his particular portion of the land; none has any interest or voice in the operation of the building; and none has an interest in the ownership or in the management of the department store. (R. 19, 40, 53)

The lease provides that the lessee shall erect upon the entire tract (of which the Marshall land is part) a steel and fireproof building; that the lessee shall pay the taxes and water rent and all charges for electricity, etc.; and that the lessee shall keep the premises insured, shall make all repairs without abatement of rent, shall remove all debris from the premises, etc. (R. 19, 93)

The deed of trust provided that the trustee should hold title to the premises, collect the rents due under the lease and pay the net income to the beneficiaries. The deed was revocable,¹ and provided further that the trust should terminate upon the death of the last survivor of the grantors and, in any event, on April 30, 1968, the date upon which the lease expired.

The trustee's only function was to receive the rentals due with respect to the Marshall land and, after paying interest and amortization upon the mortgage and deducting the trustee's compensation, to pay the net balance over to the beneficiaries in quarterly installments. The trustee had no share in the management of the department store (R. 53) and, since the lease is a net lease, it had no responsibility for the payment of taxes, insurance, or other charges (R. 53, 62). It did not even have responsibility for seeing to the maintenance of insurance upon the property, since another

¹ The trust was in fact revoked by action of the beneficiaries on August 7, 1936. (R. 51)

company was trustee of the various insurance policies for the benefit of all of the owners. (R. 59) In recognition of these very limited functions and responsibilities, the trustee served for a compensation of \$800 per year, an amount considerably less than would be a fee based upon the trustee's regular rates for the administration of trusts. (R. 53)

The trustee handled the estate in the ordinary course of its trust business, in exactly the same manner as it handled any one of hundreds of other trust estates. (R. 53, 61-62)

Aside from the collection of rent and the distribution thereof as above outlined, the only other action of the trustee was the negotiation of an agreement by which the rent due under the lease was reduced after the tenant had gone into bankruptcy and had been reorganized. (R. 62-63, 67) In its opinion, (R. 147, 148) the court below states that the trustee also negotiated a new mortgage upon the premises in 1927. This is incorrect. The new mortgage was negotiated by the Marshall heirs themselves. (R. 50, 51)

The deed provided that the trustee should not be liable beyond the assets in its hands; but it contained no express limitation of liability on the part of the beneficiaries. It contained no provision for the issue of certificates of interest.

The Commissioner of Internal Revenue was of the opinion that the trust was an "association" taxable as a corporation, and he made an assessment against the petitioner of income taxes and excess profits taxes for the year 1934², calculated on that basis. (R. 9)

² A similar assessment was made with respect to the years 1932 and 1933, but the court below correctly held

The determination of the Commissioner was sustained by the Board of Tax Appeals, two members dissenting. (R. 15) On appeal to the Circuit Court of Appeals, the decision of the Board of Tax Appeals was affirmed, Maris J. dissenting. (R. 145, 150)

Reasons Relied on for the Allowance of the Writ.

1. The decision of the court below is a decision upon an important question of general law. It is believed that the majority opinion (Biggs and Clark, JJ.) reaches a result which is unsound and untenable. If the decision is to stand, it will completely alter what has been supposed to be the law on the subject. As was said by Judge Maris in his dissenting opinion,

"As I see it, the trust was in every respect a typically traditional one 'to hold and conserve particular property, with incidental powers,' as Chief Justice Hughes put it in *Morrissey v. Commissioner*, *supra*, p. 357. * * *

"The majority of the court point to certain characteristics which in their view stamp the trust as a business one, but all of these are present in the ordinary type of traditional trust. Indeed I find it hard to conceive of a type of trust which would be more typically traditional and less of a business trust than this. *It seems to me that under the decision of the court in this case every trust in which one or more trustees hold and administer real property for two or more beneficiaries must be held to*

that the assessment for those years was barred by limitation, in accordance with the principles set forth in the decision of this Court in *Germantown Trust Company v. Commissioner*, 309 U. S. . . . , 84 L. Ed. These years are, therefore, not in issue at the present time.

*be a taxable association and that the 'traditional trust' of which the Chief Justice spoke does not exist. I cannot believe that the Revenue Acts intended any such result."*³ (R. 151-152)

2. The decision of the Circuit Court of Appeals runs directly counter to the decisions of this Court in *Morrissey v. Commissioner*, 296 U. S. 344, 80 L. Ed. 263 (1935) and *A. A. Lewis & Co. v. Commissioner*, 301 U. S. 385, 81 L. Ed. 1174 (1936), in which this Court held that trusts, the object of which is "to hold and to conserve particular property, with incidental powers," are not to be taxed as corporations.

3. The decision of the court below is in direct conflict with the decisions of the Circuit Courts of Appeals for the First and Seventh Circuits in *Lansdowne Realty Trust v. Commissioner*, 50 F. (2d) 56 (C. C. A. 1, 1931) and *Myers v. Commissioner*, 89 F. (2d) 86 (C. C. A. 7, 1937).

4. This Court endeavored, in the case of *Morrissey v. Commissioner*, *supra*, and in the related cases, to lay down guiding rules of decision with respect to the question what trusts are to be considered as "associations" taxable as corporations. Unfortunately, despite its great practical importance, the question still remains unsettled, as is evidenced not only by the fact that the decision of the court below and the decision of the Board of Tax Appeals were arrived at by divided tribunals, but also the fact that the courts as well as the Board of Tax Appeals are still uncertain as to the guiding principles to be followed. The subject should, therefore, be further clarified by this Court.

³ The italics have been supplied.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court, for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in this case; that the judgment of said Court may be reversed; and that your petitioner may have such other and further relief in the premises as to your Honorable Court may seem meet and just.

And your petitioner will ever pray.

CHARLES DENBY,
Attorney for Petitioner.
